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IN THE

Supreme Court of the United States

Term, 1965

No. ~~1194~~ 164

ABRAHAM POTTER, MAXWELL POTTER, and HAROLD POTTER, Co-Partners doing business as POTTER'S CAMERA STORE,

Petitioners,

against

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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No. _____

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Petitioners,

against

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Claims dated July 17, 1964 unanimously dismissing the petition and the order of the United States Court of Claims dated February 19, 1965 denying the motion by petitioners for a rehearing.

Opinions Below

The United States Court of Claims, Durfee, J., rendered an opinion and order entered in the Office of the Clerk of the United States Court of Claims on July 17, 1964 Ct. Cl. No. 517—1959 and has not been officially reported but is set

out in Appendix A, *infra*, at pp. 7a-20a. Petitioners' motion for a rehearing was denied on February 19, 1965 by the Court of Claims and said order was not officially reported, but is set out in Appendix A, *infra*, at pp. 21a-22a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1255.

Questions Presented

1. Did the Court of Claims establish a new conception of its jurisdiction, exceed its established statutory jurisdiction or act in excess of its powers when, in a government contract action, it conducted a trial *de novo* instead of confining and limiting its inquiry to a review of the administrative record by holding that a party's failure to timely object to the introduction of *de novo* evidence constituted a waiver of said Court's authority to such review. (See: *United States* v. *Carlos Bianchi & Co., Inc.*, 373 U. S. 709, 83 S. Ct. 1409, 10 L. Ed. 2d 652 (1963); contra *Stein Bros. Mfg. Co.* v. *United States*, 337 F. 2d 861 (1963)).

2. Did the Court of Claims, in limiting itself to a review of the administrative record, permit error in failing to reverse the administrative determination which was not supported by substantial evidence?

3. Did the Court of Claims, in limiting itself to a review of the administrative record, permit error in failing to reverse an administrative determination which was founded solely upon unsworn testimony?

Statutory Provisions Involved

The statutes involved are United States Code, Title 41, Sections 321,322; United States Code, Title 28, Section 1491; United States Code, Title 5, Sections 1001 *et seq.* (Administrative Procedures Act); United States Code, Title 28, Section 2503. The pertinent portions of these statutes are set forth in Appendix B, *infra*, pp. 1b-2b.

Statement

The proceedings involve an action by petitioners against the United States of America to recover the amount of $183,519.52 under Contract No. GS-00P-22465-ICA entered into by the General Services Administration (sometimes referred to as GSA) in behalf of the United States of America with petitioners on October 3, 1956 (Appendix A, p. 2a). This contract incorporated therein by reference certain General Provisions contained in Standard Form 32, 1949 edition. Paragraph 12, of Standard Form 32 contains the Standard Disputes Clause which, in substance, provides the means for processing disputes between the Contractor and the Contracting Officer with the right of the Contractor to appeal the Contracting Officer's decision to the head of the department whose "decision . . . shall be final and conclusive . . ." (Appendix A, p. 4a).

The contract required the supply of twenty miscellaneous products to be used by the Government of Viet Nam in connection with its police training program. Petitioners satisfactorily delivered seventeen of the twenty items called for by said contract. The remaining items, to wit, revolvers, bullets and handcuffs were not delivered since

respondent's Contracting Officer wrongfully and unlawfully terminated petitioners' right to proceed with the deliveries thereof (Appendix A, p. 2a).

On February 14, 1957 and on March 1, 1957 petitioners appealed to GSA's Administrator from the Contracting Officer's decisions terminating plaintiffs' right to proceed with deliveries of the bullets, revolvers and handcuffs. Hearings were held before GSA's Board of Review. The Board took evidence in the form of documentary exhibits and unsworn testimony. On December 18, 1957 the Board issued its recommendation to the Administrator that petitioners' appeal should be denied. On December 31, 1957 the Administrator approved the Board's recommendation thereby denying petitioners' appeal and upholding the Contracting Officer's determination (Appendix A, p. 20a).

Petitioners on December 2, 1959 commenced the above-entitled proceeding in the Court of Claims alleging in paragraph "8" of their petition that "said decision of said Board of Review is wrongful, unlawful, arbitrary, capricious and without foundation in fact or in law" (Appendix A, pp. 2a-3a). Respondents' answer put in issue the propriety of GSA's decision by denying the foregoing allegations.

A trial was held before a Commissioner of the United States Court of Claims. During the trial the administrative record was received in evidence over petitioners' objections. Despite, however, the receipt in evidence of the administrative record both sides offered and the Court received an abundance of *de novo* evidence. On October 12,

1962 the Commissioner filed his report. On July 17, 1964 the Court of Claims, in an unanimous opinion dismissed the petition concluding that petitioners "as a matter of law" are not entitled to recover. In rendering its determination the Court of Claims did not review the administrative record holding that it was not precluded from considering *de novo* evidence where a timely objection had not been made to its introduction, and in that respect reaffirmed its adherence to its prior decision in *Stein Bros. Mfg. Co.*, 337 F. 2d 861 decided July 12, 1963 (Appendix A, pp. 19a-20a). Petitioners thereafter moved the Court of Claims for a rehearing and on February 19, 1965 an order denying petitioners' motion for a rehearing was entered (Appendix A, p. 21a).

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance to the prompt and efficient prosecution and resolution of disputes between the government and those who contract with it. Great uncertainty exists over the nature of the inquiry which the Court of Claims may conduct in a government contract case under the disputes clause. Government contractors do not know whether the Court of Claims, when presented with a government contract dispute, may conduct a trial *de novo* or must limit itself to a review of the administrative record. Because of this, considerable doubt also exists as to the nature and quality of the administrative proceedings which must precede proceedings in the Court of Claims.

A government contractor involved in a dispute with the government is confronted with a dilemma resulting from

his uncertainty over the jurisdiction or function of the Court of Claims. If the Court of Claims has original jurisdiction of a government contract dispute and may conduct a trial *de novo* the preceding administrative hearing will have very little meaning for either party who will generally approach the same perfunctorily with the thought that the jurisdiction of the Court of Claims will be invoked for a full and complete trial of the issues. On the other hand, if it is known that the jurisdiction of the Court of Claims in a government contract case brought under the Standard Disputes Clause is limited to a review of the administrative record the parties will participate in the administrative hearings with a view towards obtaining a full and complete hearing. Certainty as to the nature of the Court of Claims' jurisdiction is of paramount importance to government contractors and the government.

This uncertainty has risen because of the numerous decisions of the Court of Claims concerning its conception of its jurisdiction or function. The Court of Claims has held that it may act as a trial court and receive *de novo* evidence if no objection is made by a party to the offer of such evidence; or, if an objection is raised to the introduction of new *de novo* evidence it may act in a reviewing capacity confining its inquiry to the administrative record. In so holding the Court of Claims has construed the opinion of this Court in *United States* v. *Carlos Bianchi & Co., Inc., supra,* as not being jurisdictional, but rather setting down procedural or evidentiary requirements which may be waived by failure to raise timely objections. The Court of Claims has adhered to these views although this Court has held, in *Bianchi, supra,* that the Court of Claims may only

review the administrative record in a government contract action brought under the Standard Disputes Clause. Consequently a distinct conflict exists between this Court and the Court of Claims regarding the jurisdiction or function of the Court of Claims. This conflict must be resolved in order to secure and make known to persons dealing with the government the nature of the avenues of relief available to them. For these reasons the writ of certiorari should be granted.

POINT I

The Court below has decided important questions of federal law which should be resolved and passed upon by this Court.

The writ must be granted in order to enable this Court to review, resolve and determine whether the function or jurisdiction of the Court of Claims to review an administrative determination in government contract actions under the Standard Disputes Clause may be waived by the failure of a party to timely object to the introduction of *de novo* evidence. In *United States* v. *Carlos Bianchi & Co., Inc.*, 373 U. S. 709, 83 S. Ct. 1409, 10 L. Ed. 2d 652 (1963), this Court on June 3, 1963 held that the Court of Claims was not free to receive new evidence in decisions made by federal agencies under Standard Disputes Clauses in government contracts since the "Wunderlich Act" 68 Stat. 81, 48 U. S. C. 321-322 limited the function of the Court of Claims to a review of the administrative record. In arriving at its determination Mr. Justice Harlan held as follows:

> "It is our conclusion that, apart from questions of fraud, determination of the finality to be attached

> to a departmental decision on a question arising under a 'disputes' clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history."

On July 12, 1963, the Court of Claims in *Stein Bros. Mfg. Co.* v. *United States,* 337 F. 2d 861 (1963) had its first opportunity to apply this Court's ruling in *Bianchi, supra.* Despite the clear and unambiguous language of this Court holding that it must limit itself to "consideration of the record before the department", the Court of Claims held that *de novo* evidence was properly received by it when neither party made timely objection to its offer and introduction. There the Court of Claims at page 862 of its opinion held as follows:

> "Contrary to its action in the Bianchi case (373 U. S. 717, 83 S. Ct. 1415), the Government did not here oppose or object to such evidence becoming a full part of the case, at any time until after the oral argument before this Court. There was no hint of an objection at the trial; in fact, the Government introduced a quantity of new evidence to bolster the record before the Board. No objection to new evidence was stated in the briefs. Nor was one made at the argument. However, shortly thereafter the Government informed us that it did object. In these circumstances, we consider that no objection was timely made and that any exception available to the Government was voluntarily foregone and relinquished unless the requirements stated in the Bianchi decision is a jurisdictional one which cannot be waived while the case is pending in this Court.
>
> "We do not regard the Bianchi requirement as jurisdictional in that sense. The Wunderlich Act,

> itself is not phrased in jurisdictional terms, and its legislative history does not suggest that Congress considered its provisions for limited review so compelling that the Government could not waive it, wholly or partially. In Bianchi, the Supreme Court took pains to point out twice that the Government had affirmatively objected to the admission or consideration of new evidence in that case. There is nothing in the opinion to suggest that these objections were unnecessary or that the Court's holding is a jurisdictional one. The opinions in the earlier cases in which the Supreme Court upheld finality clauses in Government contracts were likewise free from any suggestion as such clauses deprived this Court of power; those decisions apply rules of contract law not of judicial jurisdiction. That the problem is evidential or procedural, not jurisdictional is also indicated by two cases cited by the Supreme Court in Bianchi as showing that a court of original jurisdiction can perform the functions of reviewing an administrative decision on the record made before the agency . . .".

In sum, the Court of Claims holds that whether it acts as a reviewing or a trial court in a government contract case depends only upon a party's timely objection to the offer at the trial of *de novo* evidence. Following its determination in *Stein Bros. Mfg. Co., supra,* the Court of Claims continued to adhere to its decision.*

In the instant action the Court of Claims did not follow *Bianchi, supra,* but rather received *de novo* evidence. Al-

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* See *WPC Enterprises, Incorporated* v. *United States,* 323 F. 2d 874, 878-879 (1963); *Wingate Const. Co.* v. *United States,* Ct. Cl. No. 394-60, decided October 11, 1963; *National Presto Industries, Inc.* v. *United States,* 338 F. 2d 103 (1964).

though asked by the Government to rule that it was bound by the administrative record the Court of Claims refused to do so and restated its adherence to *Stein Bros. Mfg. Co., supra.* Notwithstanding the fact that the pleadings in this case squarely placed before it the arbitrariness, capriciousness and lack of substantial evidence of the administrative determination, neither the opinion of the court nor the report of the Commissioner specifically discussed or passed upon the administrative determination. Instead the Court of Claims received new evidence and decided the case upon the basis of such new evidence.

The jurisdiction of the Court of Claims is governed by two statutes each of which were enacted by Congress and in that sense are co-extensive and co-ordinate. (See: 28 U. S. C. 1491; 41 U. S. C. 321-322.) Section 1491 of Title 28 declares that the jurisdiction of the Court of Claims extends to "any claim against the United States founded . . . upon any express or implied contract with the United States . . ."; and Sections 321-322 of Title 41 permit review of decisions of the heads of departments involving questions arising under government contracts with the provision that a departmental decision on a question of fact pursuant to a disputes clause shall be final and binding unless it is fraudulent or capricious or so grossly erroneous as necessary to imply bad faith or is not supported by substantial evidence. With these statutes must be considered the decision of this Court in *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234, 66 S. Ct. 1000 (1946), which held that the jurisdiction of the Court of Claims may not be invoked unless all prior administrative remedies were first exhausted. These authorities, read with *Bianchi,*

supra, impel the conclusion that the limitations upon the function of the Court of Claims is jurisdictional.

That these limitations are jurisdictional and not as the Court of Claims states in *Stein Bros. Mfg. Co., supra,* as "evidential or procedural" is evidenced by the House Report recommending passage of the "Wunderlich" Statute. Said report reads as follows:

> "A principal change which the amendment effects is in S. 24 is to restore the *standards of review* based on arbitrariness and capriciousness. The standards of arbitrariness and capriciousness in relation to the review of administrative actions were also prescribed in the Administrative Procedures Act of June 11, 1946, Ch. 324, §10, 60 Stat. 243; 5 U. S. C. 1009. There is a wealth of judicial precedent behind these *standards of review* and it is the Committee's belief that they should not be abandoned." (Emphasis ours).

The repeated use of the words "standards of review" by the Committee is significant indeed. It expresses an intention of the part of the legislature in enacting the bill to authorize "review" of administrative determinations rather than trials *de novo.* By the enactment of the Wunderlich Statute a policy was established by which there was reposed in administrative agencies the primary power to fully hear the contract dispute upon evidence received under Wunderlich Act criteria while the determinations of said agencies may be reviewed in the Court of Claims. In this respect this Court in *Bianchi, supra,* expressed itself as follows:

> "This sound and clearly expressed purpose would be frustrated if either side were free to withhold evidence at the administrative level and then to intro-

> duce it in a judicial proceeding. Moreover, the consequence of such a procedure would in many instances by a needless duplication of evidentiary hearings and heavy additional burden in the time and expense required to bring litigation to an end . . .".

The enactments of Congress accompanied by the decisions of this Court render it markedly clear that primary jurisdiction of disputes under government contracts was vested in the administrative agencies with whom such contracts have been made and that such agencies through the procedures established there may hear and determine such disputes within the criteria laid down by law. By its enactment of the Wunderlich Statutes Congress declared that the jurisdiction of the Court of Claims may be invoked only if prior administrative procedures have been first exhausted and then the Court of Claims is limited to a review of the administrative decision in order to determine whether the same was not arrived at arbitrarily or capriciously and is founded upon substantial evidence.

All of this of course relates to the jurisdiction and power of the Court of Claims over the subject matter which it may hear. No litigant is authorized to waive that jurisdiction so as to vest in the Court of Claims a power greater than Congress authorized by statute. Consequently it must be held that the decisions of the Court of Claims in *Stein Bros. Mfg. Co., supra,* as well as those decisions in the Court of Claims which followed it are erroneous insofar as they hold that a party by failing to timely object to the introduction of *de novo* evidence will waive review of an administrative decision and consent to a trial *de novo.* Furthermore, it must be held that the requirement stated

in *Bianchi, supra,* is jurisdictional which cannot be waived and that the problem is not "evidential or procedural" as the Court of Claims has declared. Specifically it must be held that the Court of Claims in the instant case could not receive *de novo* evidence and was limited to a review of the administrative record. Had it acted as a court of review the Court of Claims was bound to reverse the administrative decision for the reasons set forth in Points II and III *infra.*

POINT II

The Court of Claims, in reviewing the administrative determination, was bound to reverse and set it aside since it was not supported by substantial evidence.

The decision of GSA's Administrator in the instant case is not supported by substantial evidence since the agency relied upon pure hearsay as a basis for its decision. The administrative record reveals that the Contracting Officer rejected the revolvers which petitioners proposed to supply and terminated the contract in reliance upon a report furnished him by the H. P. White Laboratory, after it had conducted certain comparative tests between the revolver which petitioners proposed to furnish and a Smith & Wesson revolver. At the GSA hearings the Government introduced in evidence the H. P. White Laboratory Report without calling as a witness, Mr. Munhall, the person who conducted said tests. Had Mr. Munhall testified and been cross-examined it is entirely likely that the result, at the administrative level, would have been different. This is made indeed apparent by the Court of Claims, in its opinion, where it held that the trial commissioner has

found "that no adequate comparative tests were run on the Gabilondo revolvers" (Appendix A, p. 9a). The Contracting Officer had no proper basis to reject the revolvers petitioners proposed to furnish since the tests were found to be inadequate. Also, in relying upon the hearsay White Laboratory Report GSA's Administrator had no proper evidentiary basis to uphold the Contracting Officer's decision since a report made by a person not a party to an administrative hearing is inadmissible (*Bridges* v. *Wixon*, 326 U. S. 135, 153; *Aetna Portland Cement Co.* v. *Federal Trade Comm.*, 7th Cir., 1946, 157 F. 2d 533, 550). Judicial repugnance towards ex-parte statements being considered as evidence in administrative proceedings was expressed by the 7th Circuit in *Aetna, supra,* citing *United States* v. *International Harvester Company,* 274 U. S. 693, 703, wherein this court held ". . . that to treat the statements in this report—based upon ex-parte investigation . . . as constituting in themselves substantive evidence upon the questions of fact here involved, violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first-hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination." Relying upon those actions that the 7th Circuit in *Aetna, supra,* concluded that the letter of a person who had died was incompetent as evidence in the administrative hearing. By the same reasoning the report of the H. P. White Laboratory was incompetent as evidence at the hearings conducted by GSA. However GSA received said report and relied thereon in arriving at its decision. Its doing so constituted fundamental error warranting the reversal of its decision by the Court of Claims.

The Wunderlich Act requires an administrative decision to be supported by substantial evidence. This bars the use of ex-parte reports. Testimony of witnesses appearing before the House Judiciary Committee while it was considering the Wunderlich Act, stated that the procedural requirement of the "substantial evidence test" contemplated by the proposed act would:

> "result in these various departments and agencies feeling that they would have to produce their witnesses at these hearings and permit the Contractor to examine them, in order to have in the record some substantial evidence to support their decision when they go up on appeal to the Court." (House Hearings, pages 79-80, Judiciary Committee on H. R. 1839, et al. 83d Congress, 1st Session.)

Obviously the thrust of the Wunderlich Act is directed towards the prohibition of unreliable hearsay at administrative hearings and encourages the utilization of quality evidence. The substantial evidence requirement precludes any consideration of hearsay or ex-parte reports or statements. The substantial evidence requirement precludes the concealment of witnesses or rendering them unavailable. Rather the substantial evidence rule perceives full and open hearings at which hearsay is banned but witnesses are produced who testify and are cross-examined. GSA clearly failed to observe and adhere to the substantial evidence rule. Consequently its determination should have been reversed by the Court of Claims. Its doing so would be supported by the weight of authority.

Southern Stevedoring v. *Voris*, 5th Cir., 190 F. 2d 275, 1957;

Valley Mold and Iron Corp. v. *National Labor Relations Board,* 7th Cir., 116 F. 2d 760, 767;
Morgan v. *United States,* 304 U. S. 1, 58 S. Ct., 773, 82 L. Ed. 1129;
Brotherhood of R.R. Trainmen v. *Swan,* 7th Cir., 214 F. 2d 56, 59 (1954);
National Labor Relations Board v. *Amalgamated Meat Cutters,* 9th Cir., 202 F. 2d 671 (1953);
Consolidated Edison v. *National Labor Relations Board,* 305 U. S. 197, 229;
United States v. *Hamden Co-Op Creamery Co.,* 292 F. 2d 130, 133.

These decisions serve as authority for the proposition that substantial evidence sufficient to support an administrative decision contemplates a full and complete hearing which "... embraces not only the right to present evidence but also reasonable opportunity to learn the claims of the opposing party and to meet them ...". (See *Valley Mold and Iron Corp.* v. *National Labor Relations Board, supra,* at page 767.)

Southern Stevedoring v. *Voris, supra,* is particularly germane insofar as the weight to be given hearsay or ex-parte statements. There, a proceeding took place under the Longshoremen and Harbor Workers Compensation Act wherein a claimant contended that while lifting a sack of sugar in the courses of his employment he strained his back. At the hearings before the Compensation Board the employer called two physicians, one who testified by deposition and the other in person. Both were extensively cross-examined and testified that the claimant did not sus-

tain the back injury in the course of his employment. The claimant in contradiction of this, offered, over the employer's objection, a letter from the superintendent of a hospital giving claimant's case history and concluding that a back injury occurred. The Deputy Commissioner awarded compensation and the District Court sustained the award. The Court of Appeals reversed and remanded the cause holding in substance, that although the Compensation Board is not bound by common law or statutory rules of evidence, the denial of the right of cross-examination by admitting an ex-parte statement consisted of a denial of "fundamental" principles which inhere in due process". In reversing the determination of the court below, the Court of Appeals at page 277 of its opinion held as follows:

> "By admitting the ex-parte statement, upon which the Deputy Commissioner apparently based his decision, at least in part, the right of cross-examination was effectively denied appellant upon a crucial issue. Even under the liberal provisions of the Longshoremen Act, we cannot sanction this practice. As was said in Interstate Commerce Commision v. Louisville and N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 187, 57 L. Ed. 431, 'but the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defendant . . . all parties , . . must be given opportunity to cross-examine witnesses . . .". Moreover Section 7(c) of the Administrative Procedures Act, 5 U. S. C. Section 1006(c) expressly provides that 'every party shall have the right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts.' "

Further in the opinion the following appears:

> "With the two ex-parte letters excluded, as they should have been, the Deputy Commissioner's findings . . . would be without substantial evidence to support it. Such a finding is not in accordance with the law and it is the court's duty to set aside. Section 10(e), Administrative Procedures Act, 5 U. S. C. A. Section 1009(e) . . .".

The substantial evidence required to support an administrative determination is not satisfied when hearsay is relied upon and the right of cross-examination is denied. Because the decision of GSA's Administrator was founded in hearsay insofar as his decision sustaining the Contracting Officer's termination of petitioners' right to proceed with deliveries of revolvers, said decision was not supported by substantial evidence. Accordingly, the Court of Claims, in reviewing said determinations, was bound to have reversed it.

POINT III

The Court of Claims, in reviewing the administrative determination, was bound to reverse and set it aside since the administrative determination rested solely upon unsworn testimony.

The administrative determination is a nullity and cannot serve as the valid basis for any administrative determination since it was founded upon unsworn testimony. Paragraph "9" of the Commissioner's findings which was adopted by the Court of Claims states that the Board of Review ". . . took evidence in the form of documentary exhibits and unsworn testimony" (See Appendix A, p. 20a).

Sworn testimony is a fundamental requirement of any determination whether judicial or administrative. "Although administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which inhere in due process . . ." (*Southern Stevedoring* v. *Voris*, 5th Cir., 1951, 190 F. 2d 275). The requirement of sworn testimony to assure litigants a due process has as its object the effectuation of the means designed to obtain the truth and to exclude testimony which is unbelievable and dishonest. "The safe guards set up to combat testimony of this character are the oath and the right of the adverse party to cross-examine. The omission of either of these tests of testimony will render the testimony objectionable" (*Mid-City Bank and Trust Co.* v. *Reading Co.*, 3 F. R. D. 320, 1949; *Overfield* v. *Penroad Corporation*, 1941, 42 F. Supp. 586; *Tice* v. *Mandel*, 76 N. W. 2d 124). The object of the rule requires the witness to take an oath is to effect conscience and compel him to speak the truth and let him open to perjury in case he falsifies. However, the Board of Review, as the Commissioner has found, failed to require the witnesses before it to take an oath. Consequently the testimony upon which the administrative determination rests its decision is unreliable and objectionable.

The latter gains further emphasis for the reason that the Administrative Procedures Act (5 U. S. C. 1006) authorizes presiding officers at administrative hearings to administer oaths and affirmations. However the Board of Review failed to adhere to this mandatory statutory requirement. Furthermore Section 2503 of Title 28, makes

it mandatory for the oath to be administered to witnesses in proceedings before Commissioners of the United States Court of Claims. Since testimony in the Court of Claims must be under oath, the same requirement should apply to administrative proceedings whose determinations are reviewable in the Court of Claims. To hold otherwise would require the Court of Claims to review administrative determinations rooted in unsworn testimony without power to reject such determinations while at the same time compelling it to require sworn testimony in proceedings over which it possesses original jurisdiction. A result of this nature was certainly not contemplated by Congress. Consequently all proceedings before the Court of Claims, whether originally or by way of review, must be based upon sworn testimony. An administrative record based upon unsworn testimony is objectionable and renders the administrative determination objectionable. This is so since the decision is founded upon testimony which is fundamentally reliable and unacceptable by any judicial or quasi-judicial body. Consequently the Court of Claims, in reviewing the administrative determination based upon unsworn testimony was bound to reverse and set it aside.

CONCLUSION

The questions petitioners raised are of fundamental importance to the government and to government contractors both as to their rights before administrative agencies having jurisdiction of disputes arising under such contracts and before the United States Court of Claims following the conclusion of such administrative hearings. Surely the questions raised by this petition should be decided by this Court because the continued misapplication by the Court of Claims of the decision of this Court in *United States* v. *Carlos Bianchi & Co., Inc., supra,* has resulted in the exercise of jurisdiction which it does not possess over administrative determinations arising under government contracts disputes.

By reason of the foregoing the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A—Petition, General Provisions, Defendant's Answer, Opinion, Findings of Fact and Order

PETITION

IN THE

COURT OF CLAIMS OF THE UNITED STATES

DOCKET NUMBER 517-59

ABRAHAM POTTER, MAXWELL POTTER and HAROLD POTTER, co-partners, doing business as POTTER'S CAMERA STORE,

Plaintiffs,

against

UNITED STATES OF AMERICA,

Defendant.

To The Honorable Justices of the United States Court of Claims

The petition of plaintiffs respectfully set forth the following:

1. Plaintiffs are a co-partnership lawfully organized and existing pursuant to the laws of the State of New York, whose principal place of business is located in the County of Kings, City and State of New York.

2. That each of the co-partners comprising said co-partnership is a citizen of the United States.

3. This claim is filed against the United States of America under and pursuant to Title 28 U. S. Code 1491.

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4. On or about October 3, 1956, plaintiffs entered into a written agreement with the United States of America, which contract was issued by the General Services Administration, Federal Supply Service, under contract No. GS-00P-22465-ICA, a copy of which is annexed hereto, marked Exhibit "A" and made a part hereof.

5. That said agreement required plaintiffs, among other things, to furnish 20 items of supplies to the defendant for a purchase price totaling $187,565.45. Among other things, said contract provided for a 7% discount for the award of all of the items, said discount amounting to $13,129.58, said contract, therefore, having a net purchase price of $174,435.87.

6. That subsequent to the making of said agreement the plaintiffs delivered unto the defendant all of the supplies called for by the contract except three items of said supplies, to wit, handcuffs, revolvers and ammunition.

7. That the aforesaid handcuffs, revolvers and ammunition were not delivered by plaintiffs to defendant for the reason that defendant, wrongfully, unlawfully, arbitrarily, capriciously and without justification in law or in fact, refused to inspect and accept delivery thereof, with the consequence, that defendant terminated plaintiffs' right to proceed with the delivery of said handcuffs, revolvers and ammunition.

8. That following defendant's termination of plaintiffs' right to proceed with delivery of said handcuffs, revolvers and ammunition, plaintiffs appealed to the Board of Review of the General Services Administration, and after a hearing, said Board of Review denied plaintiffs' appeal

and upheld defendant's termination of plaintiffs' right to proceed with deliveries of said handcuffs, revolvers and ammunition. That the said decision of said Board of Review was wrongful, unlawful, arbitrary, capricious and without foundation in law or in fact.

9. That by reason of defendant's refusal and failure to accept delivery of the aforesaid handcuffs, revolvers and ammunition, plaintiffs have been damaged in the amount of $183,519.92.

10. No person other than plaintiffs is the owner of this claim or has any interest therein, and no assignment or transfer of this claim, or any part thereof or interest therein has been heretofore made.

11. Plaintiffs are the owners of this claim and there has been no assignment or transfer of this claim or any part thereof.

12. Plaintiffs are justly entitled to the amount herein claimed after allowing all just credits and claims.

WHEREFORE, plaintiffs pray that judgment against the United States of America in the amount of $183,519.92 with interest thereon be made and entered herein in favor of plaintiffs.

JOSEPH GOLDBERG

JOSEPH GOLDBERG
Attorney for Plaintiffs
Office & P. O. Address
501 Fifth Avenue
New York, N. Y.

Appendix A

GENERAL PROVISIONS

(Supply Contract)

12. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided,* That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

Appendix A

DEFENDANT'S ANSWER

IN THE

UNITED STATES COURT OF CLAIMS

No. 517-59

ABRAHAM POTTER, MAXWELL POTTER and HAROLD POTTER, co-partners, doing business as POTTERS CAMERA STORE, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

(Filed April 7, 1960)

For its answer to the petition defendant:

1-2. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 1 and 2.

3. Neither admits nor denies the allegations of paragraph 3 as a conclusion of law.

4-5. Admits the allegations of paragraphs 4 and 5.

6. Admits the allegations of paragraph 6 except denies that the ammunition referred to consisted of other than bullets.

7. Denies the allegations of paragraph 7 except admits that the handcuffs, revolvers and ammunition consisting

only of bullets contracted for were not delivered and that there was a partial termination by defendant of the contract and asserts that said partial termination was due, timely and on account of plaintiff's default under the terms and conditions of the contract with respect to delivery and inspection of said items.

8. Admits the allegations contained in the first sentence of paragraph 8 and denies the allegations contained in the second sentence of said paragraph.

9. Denies the allegations of paragraph 9.

10-11. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 10 and 11.

12. Denies the allegations of paragraph 12.

13. Except as herein admitted, denied or qualified, denies all the allegations of material fact contained in the petition.

WHEREFORE, defendant demands judgment dismissing the petition herein.

GEORGE COCHRAN DOUB
Assistant Attorney General
Civil Division

PHILIP W. LOWRY
Attorney, Civil Division
Department of Justice

Appendix A

OPINION

IN THE

UNITED STATES COURT OF CLAIMS

No. 517-59

(Decided July 17, 1964)

ABRAHAM POTTER, MAXWELL POTTER AND HAROLD POTTER, CO-PARTNERS, DOING BUSINESS AS POTTER'S CAMERA STORE v. THE UNITED STATES

Joseph Goldberg for plaintiffs.

Manfred J. Schmidt, with whom was *Assistant Attorney General John W. Douglas* for defendant. *Daniel M. Redmond* was on the brief.

Before JONES, *Senior Judge,* WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges.*

DURFEE, *Judge,* delivered the opinion of the court:

This is a suit for damages plaintiffs claim for the alleged wrongful termination for default of their right to deliver revolvers, handcuffs and bullets under a contract with the General Services Administration.

In 1956, GSA issued an inquiry for bids to prospective suppliers for items to be used by the Civil Police Administration Program in Vietnam. Plaintiffs, doing business as

Potter's Camera Store, submitted a bid. The bid specified a delivery date 120 days after execution of the contract. On October 3, 1956, Contract GS-OOP-22465-ICA was entered into by plaintiffs and defendant. Under the contract, plaintiffs were to supply defendant several items including 2,000 "Ruby Extra" Gabilondo revolvers, 100 dozen handcuffs, and 500 cases of 38 special match bullets, 2,000 per case. The delivery date specified in the contract was 60 days after the execution date of the contract. The contract stipulated that the Spanish revolvers be comparative in quality and performance to Smith & Wesson Model 38 revolvers, or plaintiffs were to supply Smith & Wessons at the same price.

Plaintiffs delivered all the items covered by the contract except the revolvers, bullets and handcuffs. On January 17, 1957, the contracting officer terminated plaintiffs' right to proceed with delivery of the revolvers and handcuffs since plaintiffs failed to deliver on or before January 15, 1957.

On February 13, 1957, the contracting officer terminated plaintiffs' right to proceed with delivery of the bullets since plaintiffs had failed to deliver on or before January 25, 1957. Plaintiffs appealed the contracting officer's determination to the Board of Review of GSA. The Board approved the contracting officer's actions on December 18, 1957, and its action was in turn approved by the Administrator on December 31, 1957.

The Revolvers

As to the revolvers, plaintiffs advance two arguments that seem to be mutually exclusive. First, plaintiffs argue that the rejection of the Gabilondo revolvers on qualitative

grounds was improper since no adequate comparative testing was ever performed. Second, and alternatively, plaintiffs argue that if the rejection of the Gabilondo revolvers was correct, the lateness of the rejection mandated that plaintiffs be given reasonable time to procure and substitute Smith & Wessons.

The trial commissioner has found that no adequate comparative tests were run on the Gabilondo revolvers. However, the record is clear that even had the Gabilondo revolvers been acceptable to defendant, plaintiffs could not have delivered on time. Well in advance of the execution of the contract, on August 22, 1956, plaintiff were apprised by Gabilondo that "* * * we should not be able to give you a prompt delivery for the whole lot of 2,000 revolvers cal. 38 5" barrel." Again, in September, after some communication with both Gabilondo and the United States Consul in Spain concerning delivery of sample revolvers plaintiffs were informed by the Consul that "* * * because of prior commitments for the same type of pistol, they [Gabilondo] would need a *minimum* of from eight (8) to twelve (12) months to complete your order * * *." [Emphasis added.] Notwithstanding this information, plaintiffs contracted with defendant on October 3 to supply 2,000 revolvers within 60 days even though they had not yet placed a firm order with Gabilondo.

On October 11, 1956, eight days after the contract was executed, plaintiffs again received a letter from Gabilondo which again stipulated that:

> In regard to delivery, we are not able to supply the 2.000 revolvers in less than 8 months *after* the order is firmly [sic] placed, and partial shipments must be allowed. [Emphasis added.]

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Plaintiffs never placed a firm order with Gabilondo for the revolvers until January 6, 1957, and, as subsequent events bear out, it was not until June 21, 1957, that Gabilondo informed plaintiffs that it had "* * * ready for immediate [sic] shipment the *first lot of 1,000 only* "RUBY EXTRA" revolvers * * *." [Emphasis added.] Had plaintiffs chosen to rely on the quality of Gabilondo revolvers, they would still have to demonstrate their willingness, readiness and capacity to perform the contract before recovery could be had. *United States* v. *Penn Foundry & Mfg. Co.*, 337 U.S. 198 (1949). See also *Carnegie Steel Co.* v. *United States*, 240 U.S. 156, 164 (1916) where the Supreme Court pointed out "* * * the very essence of the promise of a contract to deliver articles *is ability to procure or make them.*" [Emphasis added.] Not only did plaintiffs fail to prove their willingness, readiness and capacity to deliver the Gabilondo revolvers on the due date (or even within a reasonable time after the due date and after the test results were known), but there is affirmative evidence in the record which indicates that plaintiffs did not have the capacity to deliver the revolvers. Since there is no showing that plaintiffs could have performed the contract, it is unnecessary for us to consider the question of comparative testing and the correctness of the contracting officer's action in reliance on those tests.

Plaintiffs' second argument is that the lateness of defendant's objection of the Gabilondo revolvers mandated a reasonable extension of time to enable substitution of the required Smith & Wessons. To place this argument in a chronological frame of reference, we again point out that the due date on this 60-day contract was December 3, 1956. The tests were begun on December 11th, and plaintiffs were

notified that the Gabilondo revolvers were unacceptable on December 20. Plaintiffs' right to proceed was terminated on January 17, 1957. Defendant concedes that the contracting officer did waive the first delivery date (December 3). But defendant argues that by this waiver, the Government did not surrender its right to take delivery of the revolvers *in a reasonable time.* Plaintiffs' retort that the question of what constitutes a reasonable time "is generally dependent on the facts." This is true. Consequently, we will review the pertinent facts here present to ascertain the reasonableness of the substitution time allowed plaintiffs. The contract had a 60 calendar-day duration. The parties agreed that upon rejection of the Gabilondo revolvers plaintiffs would supply Smith & Wessons. No provision for extending the due date in the event substitution became necessary was included in the contract. Both parties must have understood that under the express terms of the contract, the due date governed delivery of either the Gabilondo or the Smith & Wesson revolvers. Due to delay in testing, the Government waived the due date. Plaintiffs were informed on December 20th that the substitution of Smith & Wessons was required. In that communication, plaintiffs were reminded that:

> *There is an urgent need for these revolvers,* and the delivery is now delinquent by approximately 15 days, you are hereby notified that your failure to deliver or furnish evidence of shipment in accordance with the terms of the contract on or before January 15, 1957, may result in termination of your right to proceed with delivery, and purchase may be made elsewhere, in which event any rights in the Government arising as a result of your default will be enforced [Emphasis added.]

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Through this communication, plaintiffs were given some 26 calendar days in which to procure substitution and to make delivery.

Plaintiffs did not attempt to use this additional time to procure Smith & Wessons. They made no effort to substitute the Smith & Wessons. They did finally place an order for the Gabilondo revolvers, but as we pointed out above, even had plaintiffs stood on the comparative quality of the Gabilondos to the Smith & Wessons, the contract could not have been performed either on time or within a reasonable time. And before plaintiffs can argue that they were not given a reasonable time in which to make a substitution, when in fact the extended time given them was nearly half the life of the original contract, it would seem necessary that they make an affirmative showing of a bona fide attempt for substitution.

Since plaintiffs were unable to supply the Gabilondo revolvers, and since no serious effort to substitute Smith & Wessons for the rejected Gabilondos was made within the extension of time, we conclude that plaintiffs cannot recover on that portion of their claim relating to the revolvers. Consequently, there is no need to discuss the last "failure to furnish delivery instructions" argument raised by plaintiffs.

THE BULLETS

The letter of inquiry for bids which was sent to plaintiffs as well as other potential bidders on July 10, 1956 provided that the materials could be furnished from most foreign countries. However, the letter stipulated that the point of origin be stated in the bid quotation. The letter also contained terms of delivery as follows:

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(a) Products manufactured in and shipped from U.S.A.

* * * * *

(2) FAS Vessel U.S. port of exit (bidder to state port or give Government Option of ports named).

(b) Products manufactured in and shipped from source countries other than U.S.A.

(1) F.O.B. vessel at port of exit (bidder to state port).

Though plaintiffs did specify that shipment of some items would originate in foreign countries, nothing was said about Item 15, the bullets.

The contract, as ultimately executed, provided for foreign inspection points for some specified items (the revolvers, typewriters and cameras) but not for the bullets. The inspection point for *all other items* was to be the "Contractor's Plant, New York, N. Y."

As to delivery, no provision was made in the contract for foreign delivery points on any item other than the revolvers, typewriters, cameras and some optical supplies. The delivery point for all other items of the contract was specified as "FAS Vessel, Port of Shipment, New York—All American Items."

Though the contract was not executed until October 3, 1956, plaintiffs made no inquiries of ammunition manufacturers until October. During that month, two American manufacturers were approached. It was then that plaintiffs became aware that the specified bullets had been discontinued as a stock item by American producers *and were not available for delivery from existing inventories.*

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The one manufacturer who indicated a willingness to manufacture the bullets specified a long delivery date. Thereupon, on October 22 plaintiffs asked GSA to consider the acceptability of an alternate type bullet, but the contracting officer on October 29 rejected the request and advised plaintiffs that the specified bullet was required.

Meanwhile, a foreign manufacturer, Leon Beaux & Co. of Milano, Italy, which had also been queried in October, replied on October 22 that the bullets could be supplied at a tentative price of $34.51 per thousand with an anticipated delivery date of four months. Plaintiffs requested "your very lowest price * * * FOB Geneva." Plaintiffs also supplied four sample bullets. On November 22, Leon Beaux quoted an FOB price of $38 per thousand. The contract delivery date, December 3, expired with nothing further being done by plaintiffs, and without any action being taken by the contracting officer.

At a January 2, 1957, meeting, the contracting officer informed Gotterson, plaintiffs' agent, that delivery of the three items here in dispute was delinquent, and that GSA expected delivery of all three items *"immediately, or within a reasonable length of time."* Gotterson was also told that GSA expected delivery of the handcuffs and bullets in New York. On January 8, plaintiffs again requested the contracting officer to change the bullet specifications. This second request for a change was later rejected as we shall see.

Plaintiffs, on January 10, *more than one month after* the expiration of the contract delivery date (though a "reasonable time" extension was granted on January 2), placed an order with Leon Beaux for the bullets at a $38 per thou-

sand price, FOB Geneva, Italy. Plaintiffs requested delivery by June 1, 1957, or sooner, stating that GSA inspection would be made at the Leon Beaux factory. On that same day, they wrote the GSA Field Office in London (copy to "Inspection Division, GSA, New York City") as follows:

> According to the instructions given to us by Mr. O. W. Teckemeyer, Director, Inspection Division, GSA, you are hereby notified that item: No Code #2 (bullets, etc.) are to be inspected at the location shown below:
>
> Leon Beaux & Co. (S.P.A.)
> Via Dante 14
> Milano, Italy
>
> For your information, please be advised that this transaction has been made known to our Embassy in Italy and to the Italian Government.

Contract terms are FOB vessel Port of exit, Genoa, Italy. By the words, "instructions given to us by Mr. O. W. Teckemeyer," plaintiffs referred to the second paragraph of an October 17th letter which read:

> If material is not to be made available for inspection at your above address or at a point stated in your contract, please provide the Chief, Inspection Division, named above, with the necessary information so that the responsibility for inspection may be transferred. Notice to inspect should be in writing and ten days in advance of the desired inspection date so that inspection schedules may be prepared.

Plaintiffs' interpretation of this paragraph was that authority to unilaterally change inspection points simply by a written notice to the appropriate Inspection Division ten

days in advance of the desired inspection date had been thereby conferred upon them. Plaintiffs apparently further interpreted this paragraph as not requiring them to inform the contracting officer that they had seen fit to alter the contract. When the contracting officer communicated his understanding that the contract required inspection at plaintiffs' plant in New York City, he was informed that, though the contract did so provide, Teckemeyer's "* * * instructions have been followed * * *" and if the contracting officer could not for any reason "* * * permit inspection in Italy, we should have been advised some time ago."

Though the language of Teckemeyer's October 17th letter may be open to such an interpretation when read alone, a more reasonable interpretation of the letter when read in conjunction with the contract, would be that Teckemeyer, on behalf of the Inspection Division, GSA, was expressing *that division's willingness* to cooperate with plaintiffs if the contract were changed by proper authorities. But even if the letter of October 17th could be interpreted as authorizing plaintiffs to make changes in the inspection points, there is nothing to indicate that Teckemeyer had authority to make any such authorization. And no unauthorized officer of the Government can waive the terms of the contract. *Hawkins* v. *United States,* 96 U.S. 689, 695 (1877); *Balt. & Ohio R. R.* v. *United States,* 261 U.S. 592, 596 (1923); *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384 (1947); *Byrne Organization, Inc.* v. *United States,* 152 Ct. Cl. 578, 586, 287 F. 2d 582, 586 (1961).

But we need not delve further into this question since plaintiffs here, as in the case of the revolvers, were again in no position to deliver the bullets at the time the contract

expired, "immediately or within a reasonable length of time" from the January 2 meeting, or even within a reasonable time from the February 13th date when the contracting officer terminated plaintiffs' right to proceed with delivery. *Penn Mfg. Co. supra; Carnegie Steel Co., supra.*

THE HANDCUFFS

The contract description of the last item in question, the handcuffs, read as follows:

> Handcuffs, equal to Peerless, same as used by New York City Police Dept. Self-locking, approx. 10 oz. nickle finish.

As in the case of the bullets, the contract contains no specific provision referring to the place of inspection for the handcuffs by name. However, unlike the case of the bullets, GSA was aware from the time of plaintiffs' amendment to their bid dated July 25, 1956, that plaintiffs intended to furnish handcuffs originating in a foreign country, and that the price quotation was FOB Vessel, port of exit of the foreign country named. However, plaintiffs did not name the foreign country from which the handcuffs would originate, and the contract as executed made no reference thereto.

Negotiations for the purchase of handcuffs from B. Echeverria, S. A. Eibar, Spain were begun. An order was cabled on November 29, and confirmed by letter dated December 7, 1956. The letter of confirmation specified delivery FOB Bilbao, Spain, and provided for inspection by the London GSA Field Office as in the case of the bullets. Meanwhile, on November 17, plaintiffs wrote to the con-

tracting officer certifying the quality of the "Star" handcuffs produced by Echeverria. A sample of the handcuffs was also sent. On December 6, 1956 the contracting officer wrote plaintiffs as follows:

> The preproduction sample of handcuffs which you proposed to furnish under Code 680, Item 2, Contract GS-OOP-22465-ICA have been thoroughly examined and tested as to quality and acceptability under the provision of the contract, that is, "equal to Peerless." Enclosed as Exhibit A is an extract showing the results of the test conducted. It can be readily seen from the test results the sample handcuffs furnished for test purposes does not meet the requirements of the contract and is, therefore, not acceptable.
>
> As you are aware, deliveries of items covered by the contract are to be made within 60 calendar days after date of execution, which is December 3, 1956. Further the contract indicates that the handcuffs are to be inspected at your plant in New York City. Inasmuch as we have not as yet received notice handcuffs are available for inspection at your New York plant, it is requested that acceptable items be made available without further delay. [See Finding 39.]

We need not, however, consider the comparative quality of the "Star" to the "Peerless" handcuffs since defendant throughout the proceedings has taken the position that the contract was terminated not by reason of quality, but *solely* for failure of plaintiffs to make delivery. Cf. finding 39 and footnote 17.

After some further correspondence between plaintiffs and the contracting officer pertaining to the quality of the

handcuffs, the contracting officer wrote on December 20, 1956, that:

> The time of delivery including any extension thereof, on the above cited contract expired December 3, 1956. the records in this office indicate that neither the merchandise or evidence of shipment has been received on Item 2, Code 680, handcuffs. Since there is an urgent need for this item, you are hereby notified that your failure to deliver or to furnish evidence of shipment on or before January 15, 1957 may result in termination of your right to proceed with the delivery, and purchase may be made elsewhere, in which event any rights in the Government arising as a result of your default will be enforced. [See Finding 40.]

On January 17, 1957, by special delivery letter, the contracting officer informed plaintiffs that inasmuch as no delivery had been made or offered, plaintiffs' right to proceed was terminated. [See Finding 41.] Up to that time, plaintiffs had never informed the contracting officer that delivery could be made. Indeed, it was not until March 30 that plaintiffs informed the contracting officer that the handcuffs were ready for inspection and delivery in Spain. This fact makes it unnecessary for us to consider the same inspection point argument as was raised in regard to the bullets. Here, as in the cases of both the revolvers and the bullets, plaintiffs have failed to show an ability to perform the contract by the dates specified or even within a reasonable time. Consequently, plaintiffs cannot recover. *Penn Mfg. Co. supra; Carnegie Steel Co. supra.*

Defendant, in its brief and argument, takes the position that although both sides introduced *de novo* evidence before our commissioner, our review of the case must be confined

to the administrative record. It urges that we reverse our ruling in *Stein Bros. Mfg. Co.* v. *United States,* Ct. Cl. No. 389-59, decided July 12, 1963, where we held that defendant had waived its right to preclude consideration of *de novo* evidence since it had failed to make timely objection. Defendant further argues that in any event, objection to such *de novo* evidence made in the briefing state of the case is timely.

While it is unnecessary to consider this position of defendant in any great depth due to our disposition of this case, we might point out that in order to be timely, an objection to admission of evidence must be made prior to, or at the time, the evidence is offered. And we have previously indicated our adherence to the views set forth in *Stein, supra. Cf. WPC Enterprises, Inc.* v. *United States,* Ct. Cl. No. 256-59, decided October 11, 1963; *Wingate Const. Co.* v. *United States,* Ct. Cl. No. 394-60, decided January 24, 1964.

Accordingly, and upon the commissioner's findings of fact which are hereby adopted as the findings of the court, plaintiffs' claims are denied, and the petition is dismissed.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Lloyd Fletcher, the briefs and argument of counsel, makes findings of fact as follows:

* * *

> "9. * * * On April 8, 9, 17, and 18, 1957, hearings were held by the Board of Review of GSA with respect to plaintiffs' appeal from the determinations by the contracting officer. The Board took evidence in the form of documentary exhibits and unsworn testimony. * * *"

Appendix A

ORDER

IN THE

UNITED STATES COURT OF CLAIMS

622-52	MARTIN VON CARSTANJEN)	
134-57	DALE CONSTRUCTION COM-)	
	PANY)	
517-59	ABRAHAM POTTER, MAX-)	
	WELL POTTER AND HAROLD)	
	POTTER, CO-PARTNERS d/b/a)	
	POTTER'S CAMERA STORE)	v. THE UNITED STATES
261-60	JAMES A. BOYAJIAN, AS-)	
	SIGNEE OF TRIUMPH MANU-)	
	FACTURING CO., BANKRUPT)	
App.	THE SAC AND FOX TRIBE OF)	
3-63	INDIANS OF OKLAHOMA, ET)	
	AL.)	

These cases come before the court on motion according to Rule 17(c) and 69(b)(1), notions for rehearing, to alter or amend judgment, and for reconsideration, under Rules 68 and 69 of the rules of this court and, on consideration thereof,

IT IS ORDERED, this 19th day of February, 1965 that said motions be and the same are denied as follows:

622-52 Martin Von Carstanjen. Plaintiff's motion.

134-57 Dale Construction Company. Motion of Seaboard Surety Company, intervening petitioner.

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517-59 Abraham Potter, Maxwell Potter and Harold Potter, Co-Partners d/b/a Potter's Camera Store. Plaintiffs' motion.

261-60 James A. Boyajian, Assignee of Triumph Manufacturing Co., Bankrupt. Plaintiff's motion.

App. 3-63 The Sac and Fox Tribe of Indians of Oklahoma, et al. Appellee's motion.

BY THE COURT

WILSON COWEN
Chief Judge.

Chief Judge Cowen and Judge Collins took no part in the consideration and decision of No. 517-59 and App. No. 3-63.

Judge Davis took no part in the consideration and decision of No. 622-52.

Senior Judge Jones participated in the consideration and decision of No. 517-59 and App. No. 3-63.

Senior Judge Whitaker participated in the consideration and decision of Nos. 622-52, 517-59 and App. No. 3-63.

Appendix B—Statutory Provisions Involved

28 U. S. C. 1491: Claims Against United States Generally; Actions Involving Tennessee Valley Authority

The Court of Claims which have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended with respect to suits or against the Authority. As amended July 28, 1953, C. 253, §7,' 67, Stat. 226; Sept. 3, 1954, c. 1263, §44(a), (b) 68 Stat. 1241.

28 U. S. C. 2503: Proceedings Before Commissioners Generally

(a) Parties to any suit in the Court of Claims may appear before a commissioner in person or by attorney, produce evidence and examine witnesses. In accordance with rules and orders of the court, commissioners shall fix times for trials, administer oaths or affirmations to and examine witnesses, receive evidence and report findings of fact and, when directed by the court, their recommendations for conclusions of law in cases assigned to them. Hearings shall, if convenient, be held in the counties where the witnesses reside.

Appendix B

41 U. S. C. 321: Limitations on Pleading Contract—Provisions Relating to Finality; Standards of Review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, §1, 68 Stat. 81.

41 U. S. C. 322: Contract Provisions Making Decisions Final on Question of Law

No government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199, §2, 68 Stat. 81.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 164

ABRAHAM POTTER, MAXWELL POTTER AND HAROLD POTTER, COPARTNERS, DOING BUSINESS AS POTTER'S CAMERA STORE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 7a–20a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 17, 1964. Petitioners were granted extensions of time to December 14, 1964, within which to file a motion for rehearing. No motion for rehearing was filed by that date. A motion for leave to file a motion for rehearing out-of-time was filed on Decem-

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ber 30, 1964, and it was granted on January 8, 1965. The motion for rehearing was denied on February 19, 1965. A petition for writ of certiorari was filed on May 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari is timely.

2. Whether the Court of Claims' judgment should be reversed because, at petitioner's urging and over the government's objection, it considered evidence taken *de novo*.

3. Whether the Court of Claims improperly considered hearsay declarations or unsworn evidence.

STATEMENT

In 1956, the General Services Administration issued an inquiry for bids for twenty items to be used by the Civil Police Administration Program in South Vietnam, including revolvers, bullets and handcuffs. Petitioners were awarded the contract, which required delivery within sixty days of October 3, 1956 (Pet. App. 8a). The contract provided for delivery of Spanish-made Gabilondo revolvers, but the following provision was inserted in the contract (Ct. of Cl. Finding 6):

> The above described revolver will be tested for the U.S. Government by a private testing firm selected by GSA to determine if said revolver is equal in quality and performance to Smith & Wesson 38 Military and Police Model. If it is determined from said test that the above described revolver is not equal to Smith & Wesson

Model 38 in quality and performance, the Contractor will furnish Smith & Wesson at the same price.

Petitioners delivered seventeen of the items as provided in the contract, but failed to deliver any of the 2,000 revolvers, the 100 dozen handcuffs or the 500 cases of bullets by the specified delivery date of December 3, 1956. Two sample Gabilondo revolvers were delivered to the American Consulate on November 27, 1956, and reached the contracting officer on December 8, 1956 (Ct. of Cl. Finding 16). Pursuant to the contract, they were tested by a private firm selected by GSA, and that firm found them to be of inferior quality to the Smith & Wesson revolvers. Accordingly, the contracting officer directed petitioners to furnish Smith & Wesson revolvers. Noting that petitioners were already 15 days in default, the contracting officer notified petitioners that failure to deliver the items or to furnish evidence of shipment by January 15 might result in termination for default. Similar warnings were given in regard to the handcuffs and bullets. On January 17 and February 13, 1957, the contracting officer terminated petitioners' right to proceed with delivery of the revolvers, handcuffs and bullets, because of their failure to deliver any of those items (Pet. App. 8a; 11a).

Pursuant to the disputes clause of the contract, petitioners appealed the decision of the contracting officer to the Board of Review of the General Services Administration. The Board took evidence in four days of hearings in April 1957, and, after receiving briefs from the parties, rendered its findings and

recommendation adverse to petitioners. The recommendation was accepted by the Administrator on December 31, 1957 (Pet. App. 8a, 20a).

Petitioners brought this action in the Court of Claims in 1959. Pursuant to the practice prevailing in the Court of Claims prior to the decision of this Court in *United States* v. *Carlo Bianchi, Inc.*, 373 U.S. 709, that court received evidence *de novo*, rather than limiting its proceedings to a review of the administrative record. Following the decision in *Bianchi*, however, the United States argued that the Court of Claims should consider only the administrative findings and record and should accept those findings unless unsupported by substantial evidence. Petitioners urged consideration of the entire record, on the ground that the government had "waived its right to insist upon a mere review of the administrative record" by failing to object to the introduction of new evidence and by introducing new evidence itself (Plaintiffs' Reply Brief, pp. 3–5).

The Court of Claims agreed with the petitioners that the government had waived its right to insist upon a review of the administrative record, but ruled against petitioners on the merits. The Court of Claims held that petitioners were unable to procure or make the revolvers, bullets and handcuffs within the time specified by the contract, or even within a reasonable period of time thereafter, and that the contracting officer was therefore warranted in terminating for default petitioners' right to deliver (Pet. App. 11a-12a, 16a-17a, 18a-19a).

ARGUMENT

1. The decision of the Court of Claims in this case was rendered on July 17, 1964. Petitioners then sought and obtained extensions of time totalling approximately four months, from August 16 to and including December 14, 1964, within which to file a motion for rehearing. No such motion was filed within that period of time. On December 30, 1964, more than five months after the decision of the Court of Claims, petitioners filed a motion for leave to file a motion for rehearing out-of-time. That motion was allowed, and the motion for rehearing was denied on February 19, 1965. The petition for a writ of certiorari was filed within 90 days from the denial of the out-of-time motion for rehearing, but more than five months after the expiration of the last extension for filing a petition for rehearing granted by the Court of Claims, and more than ten months after the decision rendered on July 17, 1964. Since no petition for a writ of certiorari was filed within 90 days of the Court of Claims' decision or even within 90 days of the expiration of the rehearing period, this Court is without jurisdiction to entertain the petition. 28 U.S.C. 2101(c); *Conboy v. First National Bank of Jersey City,* 203 U.S. 141. The action of the Court of Claims in granting leave to file a motion for rehearing out-of-time could not begin a new period for the filing of a petition for a writ of certiorari. 203 U.S. at 145.[1]

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[1] This case is not one where the lower court considers on the merits a motion for rehearing which is out-of-time, but which

2. In any event, the petition raises no issue warranting review by this Court. Petitioners' principal contention is that the Court of Claims improperly took evidence *de novo* in violation of this Court's holding in *United States* v. *Carlo Bianchi, Inc.*, 373 U.S. 709 (Pet. 7–13). Not only did petitioners fail to object to this procedure before the commissioner and the Court of Claims, but they affirmatively urged the Court of Claims to approve what the commissioner had done. See p. 4, *supra*. On this issue, they prevailed in the Court of Claims. See Pet. 19a–20a. Petitioners obviously may not assert in this Court that it was reversible error for the court below to approve the principle of law they advocated.

3. Petitioners' attack on the proceedings before the Board of Review of the General Services Administration (Pet. 18–20) is also without merit. It was not error to receive into evidence a laboratory report without calling the person who conducted the tests. Since the contract expressly provided that the question whether petitioners' revolvers were equal to the Smith & Wesson would be resolved "by a private testing firm selected by GSA" (p. 2, *supra*), the relevant question was the content of the test and report,

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is filed within the period in which an appeal may be taken or certiorari may be sought. *E.g.*, *Bowman* v. *Loperena*, 311 U.S. 262, 266. Nor is it a situation where the lower court has erroneously treated a petition for rehearing as timely, thereby causing the petitioning party, in reliance upon that ruling, to forego the filing of a notice of appeal or petition for certiorari within the prescribed period. *E.g.*, *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384; *Wolfsohn* v. *Hankin*, 376 U.S. 203.

not its accuracy or the truth of the matters stated therein. Nor does the record show that petitioners objected to consideration of the reports. And, finally, the subject matter of the report did not bear on the question of petitioners' ability to complete performance on time.

Petitioners' contention that the administrative proceedings were invalid because witnesses did not testify under oath is without merit. There is no requirement imposed by contract, statute or regulation that evidence taken in arbitral administrative proceedings be under oath.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 164

ABRAHAM POTTER, MAXWELL POTTER, and HAROLD POTTER, Co-Partners doing business as POTTER'S CAMERA STORE,

Petitioners,

against

THE UNITED STATES,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Statement

This brief is submitted by petitioners in reply to the brief in opposition filed by THE UNITED STATES.

Argument

1. The hyper-technical grounds upon which THE UNITED STATES chose to oppose this petition are without legal or factual foundation.

The petition for a writ of certiorari was timely filed. It was filed 90 days following the denial of petitioners' motion for a rehearing by the Court of Claims. The motion for a rehearing was filed in the Court of Claims long prior to the expiration for the time within which a petition for a writ of certiorari may be filed. These facts alone totally distinguish this case from *Conboy* v. *First National Bank of Jersey City,* 203 U. S. 141, relied upon by THE UNITED STATES in its brief in opposition. There the motion for a rehearing was made after the time to appeal expired. However, at page 145 of its opinion, this court held that "an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal . . .". In the case at bar, petitioners' time for taking an appeal or petitioning for a writ of certiorari had not expired before their motion for a rehearing was made to the Court of Claims.

The petition for a writ of certiorari was filed 90 days following the denial by the Court of Claims of petitioners' motion for a rehearing. The motion for a rehearing was filed long prior to the expiration of their time to petition this court for a writ of certiorari. Petitioners' time to file their motion for a rehearing was extended by the Court of Claims to December 14, 1964. Under Rule 9(c) of the Rules of the Court of Claims petitioners had until December 17, 1964 to file their motion for a rehearing. The motion was mailed to the court on December 17, 1964 but was apparently not received until December 21, 1964. Thereupon the court informed petitioners' attorney that the motion was not timely filed and suggested that a motion for leave to

file out of time be made. Such motion was made by the petitioners and was granted on January 8, 1965, the court ordering that the motion for a rehearing be deemed filed. Implicit in its January 8, 1965 order is compliance and conformity with Rule 9(b)(1)(2) of the Rules of the Court of Claims. These rules authorize the Court of Claims to enlarge a period of time even though the motion for enlargement is not filed within the time for the performance of the act for which the enlargement of time is sought. By allowing such motion to be filed out of time the Court of Claims cured any element of non-timeliness.

Following the filing of the motion the court considered it on its merits. On February 19, 1965, it denied petitioners' motion for a rehearing. This court has repeatedly held that the judgment of a court originally entered does not become final until the denial of a motion for a rehearing and the time to appeal runs from the date of such denial. Consequently it cannot be argued by THE UNITED STATES that the petition for a writ of certiorari herein was not timely filed.

Furthermore, this court has held that where a lower court entertained a non-timely petition for a rehearing, and, denied it after considering its merits the time for taking an appeal runs from the date of the denial of the motion for a rehearing despite the non-timeliness thereof. *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Thompson* v. *Immigration and Naturalization Service*, 375 U. S. 384; *Gypsy Oil Company* v. *Escoe*, 275 U. S. 498; *Harris Trucking, Inc.* v. *Cherry Meat Packers Inc.*, 371 U. S. 215; *Wolfsohn* v. *Hankin*, 376 U. S. 203; *Wayne United Gas Co.* v. *Owens Illinois*

Glass Co., 300 U. S. 131, 137; *Voorhees* v. *John T. Noye Mfg. Co.*, 151 U. S. 135, 137. If it may be assumed that petitioners' motion for a rehearing in the Court of Claims was not timely filed it therefore follows that a petition for a writ of certiorari may still be filed 90 days following the denial where, as here, the lower court concluded that the motion for a rehearing was properly made and thereupon considered it on its merits. Since the motion for a rehearing was denied on February 19, 1965 the filing of the petition for a writ of certiorari on May 20, 1965 was entirely timely.

2. No new position is taken by petitioners in their petition for a writ of certiorari. Petitioners argued on pages 5-11 of their reply brief before the Court of Claims as they do here that the administrative record was not supported by substantial evidence. Expressly stated during the course of this argument was that the jurisdiction of the Court of Claims was limited to a review of the administrative record upon the basis of *United States* v. *Carlos Bianchi, Inc.*, 373 U. S. 709. Accordingly the argument raised by THE UNITED STATES in paragraph 2 of its brief in opposition is patently without merit.

3. The government's criticisms of petitioners' attack upon the proceedings before the General Services Administration is likewise without merit since they are not supported by a single citation or statutory reference. In contradistinction, the argument urged by petitioners that the Court of Claims should have reversed the administrative determination since it was not supported by substantial evidence and rested solely upon unsworn testimony is supported by ample authority.

4. In that portion of the government's brief in opposition entitled "Statement" allegations are made which are extraneous to the issues presented by the petition for a writ of certiorari and which are not supported by the evidence. In brief reply it is sufficient to state that the Court of Claims, in its opinion, confirmed the Trial Commissioner's findings that no adequate comparative tests were run upon the revolvers which petitioners sought to furnish under the contract (Pet. App. 9A). With respect to petitioners' alleged lateness in delivery it must be noted that the government waived the December 3, 1956 delivery date by failing to terminate the contract on that date for non-delivery. (Cuneo, Waiver of Due Date in Government Contracts, 43 Virginia Law Review 1). Insofar as the holding by the Court of Claims that petitioners were unable to procure revolvers, bullets and handcuffs within the time specified by the contract or a reasonable time thereafter, the authorities relied upon the Court of Claims were inapposite having no relevance to the facts of the case at bar. Consequently the recitation of these findings by the government within the context of the petition for a writ of certiorari is indeed inappropriate.

CONCLUSION

For the foregoing reasons as well as the reasons set forth in the petition for a writ of certiorari petitioners respectfully request that the petition be granted.

Respectfully submitted,

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